FILED
NOV 16 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-699

ARCHIE DALE CARSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

CHARLES W. TESSMER
Penthouse, Main Tower Bldg.
1200 Main Street
Dallas, Texas 75202

RONALD L. GORANSON
555 Griffin Square, Suite 968
Dallas, Texas 75202

Counsel For Petitioner.

SOUTHWESTERN LAW PRESS – DALLAS, TEXAS 75208 – (214) 742-1985

INDEX

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	11
Certificate of Service	13
Appendix	
Appendix A	A-1
Appendix B	A-23

Table of Authorities

Cases	Page
Alderman v. United States, 394 U.S. 165 (1969)	2, 9, 11
Brady v. Maryland, 373 U.S. 83 (1963)	4, 6, 7, 9, 10
Dennis v. United States, 384 U.S. 855 (1966)	2, 8, 10
Garrison v. Maggio, 540 F.2d 1244 (5th Cir. 1976)	7
Giglio v. United States, 405 U.S. 150 (1972)	2, 6, 7, 8
Mooney v. Holohan, 294 U.S. 103 (1935)	5
Napue v. Illinois, 360 U.S. 264 (1959)	5, 8
United States v. Agurs, 427 U.S. 97 (1976)	2, 6, 7, 9, 10
United States v. Beasley, 550 F.2d 261 (5th Cir. 1977)	10, 11
United States v. Loman, 551, F.2d 164 (7th Cir. 1977)	10, 11
United States v. Sweet, 548 F.2d 203 (7th Cir. 1977)	10
United States v. Warden, 545 F.2d 35 (7th Cir. 1977)	10
United States v. Zarattini, 552 F.2d 753 (7th Cir. 1977)	10

In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

ARCHIE DALE CARSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

The Petitioner, Archie Dale Carson, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is unreported, but is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on September 21, 1977. Leave to File a Motion for Rehearing was denied on October 26, 1977 [attached hereto as Appendix B]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1A

Did the Suppression by the Trial Court of a Properly Requested Report That Impeached the State's Key Witness by Showing That the Petitioner Was Not Prosecuted For a Prior Bribery Attempt So As To Induce Him to Become an Informant [Which Supported the Petitioner's Defense of Entrapment] Violate the Petitioner's Constitutional Right to Due Process of Law Under the *Giglio* Rule?

1B

What Is the Proper Test for Determining Reversible Error for the Suppression of Impeaching Testimony, the Existence of Which is Brought to the Trial Court's Attention During the State's Case in Chief.

2

Was the Petitioner's Right to Effective Assistance of Counsel Denied by the Trial Court's and the Appellate Court's Failure to Permit Defense Counsel to Examine the Suppressed Report at Sometime During the Appellate Process Under the *Alderman-Dennis* Rule?

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Sec. 1:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

U.S. Const. Amend. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Petitioner was charged with committing the offense of bribery of a public servant, contrary to Tex.Laws 1973, ch. 399, p. 883, §1[1].

Joe Murphy, captain in the Texas Department of Public Safety, approached the petitioner, a known bookmaker, and asked him to become an informant. The petitioner declined, but offered to pay Captain Murphy ten thousand ($10,000.) dollars to protect the petitioner's bookmaking operation. At two separate meetings, the petitioner delivered a total of five thousand ($5,000.) dollars to Captain Murphy. Petitioner and his brother were arrested after the second delivery.

Captain Murphy testified that he had instructed his men to file bookmaking cases against petitioner as long as he violated the law.[2] He also testified that the petitioner had attempted to bribe Agent Johnson at a

---

[1] Amended by Acts 1975, 64th Leg., p. 915, ch. 342, §11, effective Sept. 1, 1975 and located at Tex. Penal Code Ann., §36.02(a)(1).

[2] The following testimony was given by Captain Murphy at the trial court:

"... As long as he committed a violation of the law and booked, they were after him." (Statement of Facts of Trial Pro-

prior time, but charges had not been filed because the prosecuting attorney for Wichita County, Texas, had advised that he would not accept cases involving gamblers.[3] Captain Murphy further testified that Agent Johnson reported the bribe to him and that no charges were filed at Agent Johnson's request and pursuant to "our decision" [Statement of Facts of Trial Proceedings, p. 110-111], thus establishing that the report of Agent Johnson was Captain Murphy's report inasmuch as Captain Murphy was Agent Johnson's supervisor and approved the report.

At the close of the prosecution's case in chief, petitioner filed his *Brady*[4] motion, requesting, in part, certain evidence relevant to the guilt or innocence of the petitioner. The trial court granted the motion. Two

---

ceedings, p. 70. The Statement of Facts will hereinafter be designated "SF".)

* * *

". . . As long as he booked . . . they were going to try to put him out of business." (SF 71).

* * *

"Q An' did you say anything to [the petitioner] at that time about becoming an informer?

"A No, sir, I don't believe I did. I advised Agent Johnson to continue to work him. That as long as he violated the law we were going to try to put him out of business." (SF 71-72).

* * *

". . . I gave Tommy Johnson orders to put him in the penitentiary if he didn't cease his operations." (SF 77).

[3] Captain Murphy stated:

". . . [The petitioner] offered Agent Johnson a bribe, which he did not accept. Tommy Johnson reported that to me." (SF 110).

* * *

". . . [The] reason charges were not filed was the political situation and the fact that the District Attorney, Mr. Jim Feagan, had advised us that he would not prosecute the gambling cases in Wichita Falls." (SF 133).

[4] Brady v. Maryland, 373 U.S. 83 (1963).

exhibits were given to the trial court but not to the petitioner or his counsel. One of the exhibits was the written report of Agent Johnson.

Petitioner contended that he was entrapped by the constant approaches of Captain Murphy and other law enforcement officers, including Texas Department of Public Safety Agent Tommy Johnson. The agents, at various times, sought information from petitioner, and they told petitioner to see Captain Murphy if petitioner was going to operate a bookmaking business. Petitioner stated that the first time he got the idea he was suppose to give money to Murphy was in 1974 when Agent Johnson told him that Murphy was the boss and gave the orders.

On appeal, neither petitioner nor his counsel were permitted to examine Agent Johnson's report. The Court of Criminal Appeals stated that the report revealed that Agent Johnson reported the bribe attempt, but recommended that no action be taken because he believed the petitioner might become an informant. The court's opinion stated:

> ". . . We find nothing favorable to appellant which could have helped him in supporting his defense . . . " [Appendix A at p. 13].

REASONS FOR GRANTING THE WRIT

A
[Supression of Evidence Issue]

A basic concern of American criminal jurisprudence is that a defendant be convicted on nothing less than the full truth. *Mooney v. Holohan*, 294 U.S. 103 (1935); *Naupe v. Illinois*, 360 U.S. 264 (1959); *Brady*

v. Maryland, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976)[5]. The authorities cited reflect that the suppression by the prosecution of evidence that could affect the outcome of the trial should not be permitted.

In *Brady v. Maryland, supra*, this Court held that:

> "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . ." 373 U.S. at 87.

In *Giglio v. United States, supra*, this Court stated that when the reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within the general rule of *Brady*. The test for reversal in *Giglio* was whether or not the false testimony could in any reasonable likelihood affect the judgment of the jury. In *United States v. Agurs, supra*, the Court held that the *Brady* rule may apply in three different situations:

(1) where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and the prosecution knew, or should have known; (2) where there is a pretrial request for specific evidence; and (3) where there is no request or a general request for all *Brady* material. The test for reversal if there was no request or a general request

[5] The cases cited all are concerned with a postconviction attack on the veracity of conviction or a motion for new trial based upon after-discovered evidence. The present case concerns evidence that was "discovered" during trial, but kept from the petitioner's eyes.

for *Brady* material was whether or not the undisclosed evidence creates a reasonable doubt about the accused's guilt that did not already exist. The Court of Appeals for the Fifth Circuit in *Garrison v. Maggio*, 540 F.2d 1244 (5th Cir. 1976), has established a stricter standard for reversal where the non-disclosed evidence is impeaching evidence [the disclosure would have to result in an acquittal][6].

United States v. Agurs, supra indicates a distinction between "veracity" [or perjury] cases and cases involving "discovery" of evidence known to the prosecution, but not involving prosecutorial misconduct or corruption of the truth-finding process. *Giglio v. United States, supra*, was a veracity case where the government failed to disclose a promise of leniency made to a key government witness who had testified no promise had been made to him. *United States v. Agurs, supra*, and *Brady v. Maryland, supra*, are "discovery" cases, i.e., the government possessed information, such as a witness' criminal record or a co-defendant's confession, which it should have produced. Petitioner's case falls in both categories since the suppressed evidence affects the credibility or veracity of the state's main witness and petitioner's defense of entrapment. Also, petitioner's case should not be governed by the rule in *Agurs*

[6] See also United States v. Sutton, 542 F.2d 1239 (4th Cir. 1976), and Brach v. United States, 542 F.2d 4 (2nd Cir. 1976), indicating that the fact impeaching testimony is involved should not cause a different rule. See also United States v. Lasky, 548 F.2d 835 (9th Cir. 19770, where the Circuit Court of Appeals for the Ninth Circuit refused to consider the issue. And in United States v. McCrane, 547 F.2d 204 (3rd Cir. 1975), the Circuit Court of Appeals for the Third Circuit applied the *Agurs* standard to impeaching testimony.

since the non-disclosed evidence was identified during the trial and presented to the trial court at the close of the state's case in chief. The more appropriate rule would be the rule in *Giglio:* a new trial would be required if there was any likelihood that the undisclosed evidence would affect the judgment of the jury.

A substantial issue in any trial may be the credibility of a prosecution witness because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . ." *Napue v. Illinois*, 360 U.S. at 269. The state's only witness to the bribe testified that no cases were filed on the petitioner in Wichita County, Texas, because the prosecuting attorney stated that he would not accept the cases. The non-disclosed report apparently[7] shows that no cases were filed because the law enforcement officials were trying to convert the petitioner into an informant. Since this evidence would not only impeach the state's main fact witness, but also support the defensive theory of entrapment, there is a likelihood that the undisclosed evidence would have affected the judgment of the jury.

B.
[The Right to Effective Assistance Counsel Issue]

By reading the Court of Criminal Appeals opinion, petitioner's counsel first learned that Agent Johnson's report recommended that no action be taken because the petitioner might be induced to become an informant. The reasoning in *Dennis v.*

[7] Petitioner and his counsel still have not seen the report.

United States, 384 U.S. 855 (1966) is applicable to the present situation. That opinion stated that in an adversary system, the trial court should not be burdened with the task or responsibility of examining voluminous records because of the difficulty involved and the unrealistic assumption that the trial court's judgment, however conscientiously made, would exhaust the possibilities of use to the defense "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." 383 U.S. at 875.

Also relevant is *Alderman v. United States*, 394 U.S. 165 (1969) [discussing the right of the accused to examine unconstitutionally seized evidence for a fatal taint], where the opinion stated:

> "An apparent innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life.
>
> "And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all the relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex and the margin of error too great to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the government's case."

United States v. Agurs, *supra*, indicates a retreat from the statements of *Alderman* and *Dennis*. In *Agurs*, the Court stated that if a specific request was

made for *Brady* material ". . . it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the judge." 427 U.S. at 106.

A general reading of the cases raising the *Brady* issue indicates several procedures by which non-disclosed testimony is reviewed. After the trial court makes an in camera inspection of the material, in some cases the material is sealed and submitted to the appellate court, without defense counsel being permitted to examine the material. *United States v. Zarattini*, 552 F.2d 753 (7th Cir. 1977); *United States v. Sweet*, 548 F.2d 203 (7th Cir. 1977); *United States v. Warden*, 545 F.2d 35 (7th Cir. 1977). In other cases, the material is provided to defense counsel at the hearing on the motion for new trial. *United States v. Beasley*, 550 F.2d 261 (5th Cir. 1977). And in rarer cases, the material is given to counsel at the trial so that he can prepare an offer of proof. *United States v. Loman*, 551 F.2d 164 (7th Cir. 1977).

Petitioner contends that the only way his counsel can be reasonably effective is to have access to the non-disclosed testimony sometime during the appellate process. Any attempt by an appellate court to compare non-disclosed documents to lengthy trial records is doomed to failure since one cannot expect appellate courts to read every page of every transcript. However, defense counsel is in the best position to review the material and direct the appellate courts to the relevant areas in issue. If the material is of a sensitive nature, protective orders can be made preventing counsel from disclosing the

information[8]. Such a procedure as used in *United States v. Beasley, supra*, or *United States v. Loman, supra*, would not only provide an accused with the effective assistance of counsel, but also save the appellate courts of this country vast amounts of time. To not adopt a workable standard not only ensures that the accused will be represented by blindfolded counsel[9], but also ensures an overloading of an already overworked appellate judiciary. The holdings in *Alderman* and *Dennis* should either be resurrected and applied to the *Brady* situation, or they should be finally laid to rest.

CONCLUSION

Writ of Certiorari should be granted so as to establish the proper test for reversible error for non-disclosed evidence identified during trial, to establish the proper test for reversible error for non-disclosed impeaching evidence [thus eliminating a

[8] See United States v. Slocum, 464 F.2d 1180 (3rd Cir. 1972), where a protective order to protect the Federal Aviation Administrations Anti Air-Hijack Profile was held to be permissible. Similar orders could be used upon a showing by the government that the orders are needed. See also Alderman v. United States, 394 U.S. 855 at 165 (1969); Dennis v. United States, 384 U.S.855 at 875 (1966); United States v. Richter, 488 F.2d 170 (9th Cir. 1970); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972); United States v. Straghorn, 471 F.2d 661 (2nd Cir. 1972); United States v Fine, 413 F.Supp. 740 (D.C. Wis. 1976); United States v. Leichtfuss, 331 F.Supp. 723 (D.C. Ill., 1971); United States v. Addonizio, 313 F.Supp. 486 (D.C. N.J. 1970), affm, United States v. Addonizio, 451 F.2d 49 (3rd Cir. 1971), cert. den., United States v. Addonizio, 405 U.S. 936 (1972).

[9] Texas law permits the right of appeal. Tex. Code Crim. Proc. Ann., Art. 44.02 (1965). This Court has held that an appellant has the right to effective counsel on appeal. Douglas v. California, 372 U.S. 353 (1963); Entsminger v. Iowa, 386 U.S. 748 (1967); Anders v. California, 386 U.S 738 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); Ross v. Moffitt, 417 U.S. 600 (1974).

conflict between the Circuit Court of Appeals for the Third and Fifth Circuits], and to establish a procedure for review of non-disclosed evidence by defense counsel on appeal.

For the reasons set forth above, petitioner respectfully submits that Writ of Certiorari should issue to review the judgment and the opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

CHARLES W. TESSMER
Penthouse, Main Tower Bldg.
1200 Main Street
Dallas, Texas 75202

RONALD L. GORANSON
555 Griffin Square, Suite 968
Dallas, Texas 75202
Counsel For Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable John Hill, Attorney General for the State of Texas, Capitol Station, Austin, Texas 78711, on the same date as shown on the letter of transmittal accompanying this Petition.

CHARLES W. TESSMER
Penthouse, Main Tower Bldg.
1200 Main Street
Dallas, Texas 75202

RONALD L. GORANSON
555 Griffin Square, Suite 968
Dallas, Texas 75202
Counsel For Petitioner.

APPENDIX

APPENDIX A

ARCHIE DALE CARSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from DALLAS County
No. 52,545

OPINION

In a trial before a jury appellant was convicted of bribery. See V.T.C.A. Penal Code, Sec. 36.02. Punishment was assessed at six years and a fine of $5,000.00.

The record, including appellant's testimony, reflects that at all times pertinent to this case appellant was engaged in gambling and bookmaking operations in and around Wichita Falls. Joe Murphy, the complainant, was during that time a captain of the Texas Department of Public Safety in charge of investigating organized crime, graft and corruption and illegal gambling and bookmaking operations as well as the enforcement of other laws of Texas in the Northeast Texas District, which included Dallas and Fort Worth, and extended westward to include Wichita Falls. His headquarters were in Dallas. Sergeant Andrews was in charge, under Murphy, of the subdivision which included Fort Worth and Wichita Falls.

On December 16, 1974, Murphy and Andrews were in Little Brothers Club in Wichita Falls, when appellant joined them at their table. Appellant complained about a recent raid on his bookmaking business, and Murphy said appellant was one of the "big" men, and that he (Murphy) was going to put him out of business. Murphy stated that appellant could probably help

himself if he would cooperate with the Department of Public Safety. Appellant responded that he would not "snitch" on his friends. Appellant, during the conversation, stated that he would like to see Murphy in Dallas after the first of the year, and Murphy gave appellant his business card.

On January 21, 1975, appellant called Captain Murphy at the latter's office and arranged to meet him at a place designated by appellant. Murphy called the district attorney's office and discussed this call with assistant district attorney Ormesher. He also notified two of his D.P.S. agents, Eavenson and Rivers. Murphy then went to a Holiday Inn, the place designated by appellant, and Eavenson and Rivers also went there, separately from Murphy. There, after a discussion of some of appellant's troubles with the Internal Revenue Service, appellant told Murphy he would like to operate his bookmaking in Wichita Falls during the next football season, stating that Murphy "could take the heat off me," and offered Murphy ten thousand dollars "to tip him off when I heard of a raid going to be made up on his book." Appellant told Murphy he would pay him five thousand dollars before the football season started, and five thousand at the end of the season. After further discussion of ways and means, the two walked outside to Murphy's car, where appellant gave Murphy fifteen hundred dollars. Another meeting was set, with appellant to be joined by his brother, also in the bookmaking business. Murphy then met Eavenson and Rivers, who had observed most of the above proceedings. He also reported what had occurred to the Dallas County district attorney's office.

On February 12, Murphy had a meeting with

appellant and his brother in a Dallas restaurant. Murphy was told by the two brothers that "all we want from you is to keep your men off of us and let us operate and if you hear of any raids to be carried out by the local city and county police or the I.R.S. and F.B.I., all you have to do is call us and tell us to hook 'em or beat it out of there and we'll pick up our stuff and go." Appellant then gave Murphy thirty-five hundred dollars in currency. At this time, Murphy and nearby officers whom he had asked to be on hand arrested appellant and his brother.

Appellant testified, admitting paying the money to Murphy for his protection against raids, but stating that he was trapped into doing so by Murphy and other agents under Murphy. He said that Murphy's agents at various times sought information from him of gambling operations in Wichita Falls, and attempted to persuade him to become an informant in return for their protection of his business from police raids. They told him to talk to Captain Murphy if he expected to continue to run his operations. On December 16, 1974, he was in the Little Brothers Club in Wichita Falls when D.P.S. agent Andrews asked him to come to Murphy's table and "join them for a drink." During his conversation with Murphy at the latter's table appellant testified Murphy told him, "Dale, if you're going to continue bookmaking here in Wichita Falls you better come to Dallas and see me . . . Because if you're going to do anymore bookmaking in Wichita Falls you better come to see me and I'll make you a deal because I need to make some money . . . You scratch my back and I'll scratch yours."

According to appellant, when he came to Dallas January 21 on other business, he called Murphy and

stated "You asked me to come and see you. I'm here in town. Do you want to see me?" Murphy replied that he did, and at Murphy's request they met at a Holiday Inn, where Murphy stated he invited appellant down to make a deal, and asked "How much money would you give me to protect you in Wichita Falls this year on bookmaking?" They agreed on a total of ten thousand dollars, of which five thousand would be paid before football season began, and five thousand at the end of the season. Murphy asked for a payment at that time, saying "I need some money." Appellant admitted paying him fifteen hundred dollars on that occasion, and thirty-five hundred on February 12.

In his first ground of error, appellant argues the indictment is fatally defective in that it does not allege the necessary culpable mental state with which the offense was committed. In the trial court appellant objected to the indictment because it failed to allege all of the essential facts necessary to constitute a violation of the statute; it did not follow the stautory language; and did not allege facts sufficient to constitute an offense. He did not specifically contend in the trial court that the indictment failed to allege a necessary culpable state; however, Art. 21.05, V.A.C.C.P., provides that "where a particular intent is a material fact in the description of the offense, it must be stated in the indictment," and in Victory v. State, 547 S.W.2d 1, we held such a particular intent is an essential part of the offense, and must be alleged. See also Ailey v. State, 547 S.W.2d 610; Bocanegra v. State, 552 S.W.2d 130.

V.T.C.A. Penal Code, Sec. 36.02, as applicable at the time of the commission of the alleged offense and at the time of the trial, provided:

"Sec. 36.02. Bribery[1]

"(a) A person commits an offense if he offers, confers, or agrees to confer any benefit on a public servant, party official, or voter:

"(1) with intent to influence the public servant or party official in a specific exercise of his official powers or a specific performance of his official duties; or

* * *

"(d) An offense under this section is a felony of the third degree unless committed under Subsection (b) of this section, in which event it is a felony of the second degree."

Subsection (b) is not applicable to this case.

The indictment charged that James Monroe Carson and Archie Dale Carson (appellant) on or about February 12, 1975, in Dallas County Texas,

"did then and there unlawfully commit the felony offense of bribery in that the said defendants did offer to confer and did confer a benefit, namely, Thirty-five Hundred Dollars current money of the United States of America, on Joe Murphy, a public servant, namely a Captain of the Texas Department of Public Safety, Intelligence Service, who is charged with the official duty of investigating illegal gambling and bookmaking operations in the State of Texas and arresting any violators of the laws of the State of Texas, *with the intent to influence the said Joe Murphy in a specific exercise of his official duties*, namely, **to refrain from interfering with the defendant's operation of an illegal gambling and bookmaking operation** in the Wichita Falls, Texas area . . ." (Emphasis added).

[1] This section was amended by Acts of the 64th Legislature, effective September 1, 1975, and not in effect at the time of the commission of the instant offense, the return of the indictment, or the trial on May 20, 1975. See V.T.C.A. Penal Code, pocket parts for 1976-1977, Sec. 36.02.

V.T.C.A. Penal Code, Sec. 6.02(b) provides:

> "If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

In Broyles v. State, 552 S.W.2d 144, we held that where the applicable statute prescribes a culpable mental state, and the information or indictment tracks the statute creating the offense and alleges the required mental state set forth in the statute, the requirements of Section 6.02 are complied with.

See also Teniente v. State, 533 S.W.2d 805. Cf. Bocanegra v. State, supra; Ailey v. State, supra.

Section 36.02, supra, prescribes the culpable state necessary to the commission of bribery as "with intent to influence the public servant or party official in a specific exercise of his official powers or a specific performance of his official duties." The indictment tracks the statute, and expressly alleges this culpable mental state, (see emphasized allegations in indictment, supra) thus complying with V.T.C.A. Penal Code, Sec. 6.02. See Broyles v. State, supra; Teniente v. State, supra; also see Jones v. State, 545 S.W. 2d 771 (opinion on State's motion for rehearing, p. 774). Cf. Ailey v. State, supra; Bocanegra v. State, supra.

The first ground of error is overruled.

Appellant, in his second ground, complains of the court's refusal over objection to instruct the jury on the culpable mental state required to commit bribery. This contention is without merit. In its charge the court defined bribery in the terms of V.T.C.A. Penal Code, Sec. 36.02(a)(1), supra, and in applying the law

to the evidence expressly required a finding beyond a reasonable doubt that appellant had the "intent to influence the said Joe Murphy in a specific performance of his official duties, to refrain from interfering with the defendant's operation of an illegal gambling and bookmaking operation in the Wichita Falls, Texas area" in order to return a verdict of guilty of bribery. The converse of this was also included in the charge.

The charge adequately instructed the jury on the culpable mental state required in Sec. 36.02(a)(1), supra, and alleged in the indictment. Error is not presented. See 2 Branch's Tex.Anno.Penal Stats., 3rd Ed., Vol. Three, Sec. 36.02, p. 6.

Next appellant contends the court erred "in submitting an abstract charge on the law of entrapment." His specific complaint is that after stating the law of entrapment, the court, in applying that law to the evidence, "did not specifically use the language 'Joe Murphy or any of his agents,'" as requested by appellant.

The paragraph in the charge applying the law of entrapment reads:

> "Now, if you find and believe from the evidence beyond a reasonable doubt that the defendant committed the offense of bribery, as alleged in the indictment, but you further find or have a reasonable doubt thereof that the defendant engaged in the conduct charged because he was induced to do so by a law enforcement agent or agents using persuasion or other means likely to cause persons to commit the offense, you will acquit the defendant and say by your verdict 'not guilty'."

Ahead of this instruction, the charge properly

defined the term "law enforcement agents." See V.T.C.A. Penal Code, Sec. 8.06(b).

Appellant's requested charge to be given in lieu of the above reads:

> "Now, if you find from the evidence, or if you have a reasonable doubt thereof, that on the occasion in question Archie Dale Carson engaged in the conduct charged against him in the indictment because he was induced to do so by a law enforcement agent, to-wit: Joe Murphy or any of his agents, using persuasion or any other means likely to cause a person to commit such offense, then you will find the defendant not guilty."

We find the instruction given by the court, which included inducement by any law enforcement agent or agents using persuasion, etc., to be more favorable to appellant than his requested charge which limited the inducement to Joe Murphy or any of his agents and conclude that no harm or prejudice to appellant could have resulted from the refusal to give the requested charge. See Art. 36.19, V.A.C.C.P. See also Morrison and Blackwell's New Texas Penal Code Forms, Sec. C-806, p. 105.

The third ground of error is overruled.

In his fourth ground appellant contends the court erred in not responding to his objection that the definition of entrapment in the court's charge was too restrictive.

V.T.C.A. Penal Code, Sec. 8.06(a), Entrapment, provides:

> "(a) It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement

> agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment."

The court charged the jury in the exact terms of the above statute, and, thereafter, applied the law to the evidence, as shown heretofore under the third ground of error.

Appellant's complaint is that the court did not add to the statutory definition the following explanatory instruction:

> "Using persuasion or other means likely to cause a person to commit the offense means any effective appeal to the impulses of compassion, sympathy, pity, friendship or fear. Offers of substantial financial reward or threats of severe economic loss are included."

The evidence raising the defense of entrapment came from appellant, which is included in the summary of the evidence, supra. The statutory term "using persuasion or other means likely to cause persons to commit the offense" contains words of every day usage, and when construed is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Ramirez v. State, 518 S.W.2d 546; Adami v. State, 524 S.W.2d 693, 699. The decision whether appellant gave the money to the agent because the agent used persuasion or other means likely to cause him to commit the offense was an issue for the jury to determine under the evidence and appropriate instructions by the court. Redman v. State, 533 S.W.2d 29. In instructing the jury in the terms of Section

6.06(a), supra, the court properly declined to add the language of appellant's requested charge.

Appellant next complains of the court's charge on contradictory statements, which reads:

> "You are instructed that a witness may be impeached by showing that he or she has made other and different statements out of court from those made before you on the trial. Such impeachment evidence may be considered by you to aid you, if it does so aid you, in determining the credibility of such witness and to aid you, if it does so aid you in determining the weight you will give to him as such witness and you will consider the same for no other purpose."

The appellant objected to this instruction and requested that the charge specifically refer the jury to the specific instances of impeachment, to-wit: the impeachment of Joe Murphy and his reference to the taped telephone conversation of February 12, 1975. The trial court denied this request and an exception was taken.

Appellant directs our attention to testimony of Captain Murphy where on direct examination he testified one of his conversations with appellant occurred on February 12, in which Murphy asked whether his brother "was with him," and later, on cross-examination he said this conversation took place on February 11. On further cross-examination, it was shown by a taped telephone conversation that this conversation occurred February 12, and that the question asked by Murphy of appellant was "Are the other folks with you?"

The conflict in Murphy's answers as to the date of the meeting with appellant had nothing to do with

appellant's guilt or innocence, since the record reflected that the meeting was on February 12, and that Murphy, appellant and his brother were present, and that the brother was "with" appellant in the bribery. Appellant testified to such facts; he did not deny the payment of the money to Murphy to secure Murphy's agreement to protect him in his unlawful activities. The sole defense relied upon was entrapment, as shown by appellant's testimony. In this ground, he relies on the date conflict — February 11 or February 12, and the difference between asking if "his brother was with him" and asking "are the other folks with you" as impeachment of Murphy. In Sapp v. State, 476 S.W.2d 321, at p. 323, we stated:

> "Further, where it is apparent that the evidence offered can be used only for the purpose of impeachment, it has been held not necessary to limit the purpose in the charge: Wiley v. State, 153 Tex.Cr.R. 370, 220 S.W.2d 172 (1949)."

Since the evidence of the alleged conflict could be used only for impeachment purposes, it was not necessary to limit the purpose of such testimony in the court's charge. The refusal of the court to refer the jury to specific instances of impeachment as requested by appellant was not reversible error. See Sapp v. State, supra; Wiley v. State, supra; Article 36.19, V.A.C.C.P. The fifth ground of error is overruled.

Appellant next complains of the court's refusal to give the following request charge:

> "You are instructed that if there is any testimony before you in this case regarding the defendant's having committed an offense other than the offense alleged in the indictment, that is, a bribe in the amount of $1,500.00 conferred on Joe

> Murphy, if he did, you cannot consider said testimony unless you find and believe from the evidence beyond a reasonable doubt that the defendant committed such offense, taking into consideration the defense of entrapment as defined herein:

The evidence, including the testimony of appellant as well as of State's witness Murphy, establishes that the discussion between appellant and Murphy was that, in return for Murphy's protection, appellant would pay him ten thousand dollars, payable half before the start of football season, and half after it ended. The meeting of the two men on January 21, when appellant gave Murphy the fifteen hundred dollars, was an integral part of the transaction and was directly connected with this offense. This was a part of the pre-season payment, and thirty-five hundred dollars paid Febuary 12 completed the pre-season payment agreed on. It was all res gestae of a continuing offense and although the indictment alleged only the payment of the thirty-five hundred dollars on February 12, and the jury charge was directed solely at the offense named in the indictment, the evidence of the entire transaction was admissible as res gestae. Welch v. State, 543 S.W.2d 378; Thomas v. State, 530 S.W. 2d 836. The payment on January 21 did not constitute a separate extraneous offense, and the court did not err in refusing to give the charge on extraneous offense requested by appellant. Johnson v. State, 510 S.W.2d 944, 948; Dillard v. State, 477 S.W.2d 547; Aguilar v. State, 544 S.W.2d 935. Authorities relied on by appellant, such as Curry v. State, 316 S.W.2d 891, which did involve evidence of separate extraneous offenses, are not controlling.

The sixth ground of error is overruled.

Appellant complains, in his seventh ground, of the following paragraph in the charge as limiting the defense of entrapment to the occasion in question, i.e., the February 12th occasion. (This paragraph followed the instruction quoted in our treatment of the third ground):

> "If however, you find from the evidence beyond a reasonable doubt that on the occasion in question no law enforcement agent or agents induced the defendant to engage in the charged conduct, either by persuasion or by any other means likely to cause persons to commit such offense and that the defendant, nevertheless, engaged in the said charged conduct on his own volition and free will, then in such event, there has been no entrapment and you will be guided by the instructions in this charge without regard to any defense of entrapment."

The record reflects that appellant objected to the above paragraph as limiting "the defensive entrapment to one occasion only, whereas there were many occasions beginning with Johnny Rivers in the year 1972 where the defendant was told to go see Joe Murphy."

However, the record also shows that appellant, as No. 1E of his Requested Jury Instructions, requested the court to charge as follows:

> "If you find from the evidence beyond a reasonable doubt that *on the occasion in question* the said Joe Murphy, or any of his agents, did not induce the defendant to engage in the charged conduct," etc.[2] (Emphasis added).

The remainder reads just as the above paragraph in

[2] In his special requested charge quoted in our discussion of the third ground of error, supra, appellant also used the term "on the occasion in question."

the court's charge. Additionally, in his objections and exceptions appellant excepted to the court's failure to give verbatim the above requested charge.

Appellant here complains of the use in the court's charge of the same phrase, "on the occasion in question" which he asked the court to use in his requested instruction. The rule is well established that an accused cannot secure a reversal on an error which he himself injected into the trial. Stiles v. State, 520 S.W.2d 894; Sutton v. State, 419 S.W.2d 857; Criswell v. State, 346 S.W.2d 341; Gage v. State, 263 S.W.2d 553; Holland v. State, 246 S.W.2d 889.

Additionally, we do not find that in view of the evidence, the term "on the occasion in question" is limited to the occurrence on February 12. As heretofore shown, the "occasion in question" was not restricted to the transactions occurring February 12. The paragraph here complained of must be considered as it relates to the charge as a whole, and should not be reviewed as an isolated instruction. Bailey v. State, 532 S.W.2d 316. In instructing the jury on the law of entrapment, the court in the paragraph immediately preceding the one of which this complaint is made stated that if it found or had a reasonable doubt "that the defendant engaged in the conduct charged because he was induced to do so by a law enforcement agency or agents using persuasion," etc.[3] it should find him not guilty. This instruction does not limit the inducements, if any, to those made February 12.

Reversible error is not presented. The seventh ground of error is overruled.

[3] This instruction is quoted under the third ground of error, supra.

In his eighth ground, appellant contends the court erred in refusing, at the punishment stage to give his requested instruction that evidence of "lawful entrapment," although not a defense, could be considered by the jury in mitigation of the punishment.[4]

At this stage of the trial, the jury had already found appellant guilty of bribery, notwithstanding his plea of entrapment. In its charge at the punishment stage, the court instructed the jury:

> "You may take into consideration all of the evidence submitted before you under this charge and the previous charge wherein you found the defendant guilty in arriving at your verdict on the question of punishment."

The instruction given adequately protected appellant's rights in this regard, and any additional specific charge such as appellant requested, even if it be considered as stating a correct principle of law, would be on the weight of the evidence. The court properly denied appellant's request, and the eighth ground of error is overruled.

In his ninth ground, appellant asserts the trial court erred in failing to require the State to disclose evidence favorable to him. The specific items are (1) the transcription of the testimony given before the grand jury, and (2) a report made by D.P.S. Agent Tommy Johnson in October, 1973.

At a hearing on appellant's Brady v. Maryland[5] motion, conducted after the State had rested its case in chief, and prior to the introduction of defense

[4] Appellant's counsel frankly admits that in asserting this contention he "is treading new ground."

[5] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

testimony, the court granted the motion to require the State to disclose evidence in its possession favorable to appellant. Court's Exhibits No. 1 and No. 2 were handed the court, who inspected them and found nothing therein which was required to be shown to appellant. Said Exhibits were thereupon placed in a sealed envelope, and on appeal were sent to this Court in a sealed envelope. We have reviewed these Exhibits.

No. 1 is a transcription of the testimony of D.P.S. Agent Harold Evanson before the grand jury which indicted appellant. Evanson did not testify in this trial. No part of his testimony as reflected in Court's Exhibit No. 1 is favorable to appellant or his defense. We fail to see how appellant was harmed in its non-disclosure to him. As stated in Brown v. State, 475 S.W.2d 938 at p. 948, and quoted in Mott v. State, 543 S.W.2d 623 at p. 625:

> "The production of the grand jury testimony, of course, lies within the sound discrimination of the trial court and the accused may be permitted to inspect such testimony where a 'particularized need' is shown so as to outweigh the traditional policy of grand jury secrecy."

As in *Brown* and *Mott*, we do not conclude that appellant has shown a particularized need for the grand jury testimony so as to reflect that the trial court abused its discretion in refusing to order its production.

A review of the Court's Exhibit No. 2, Agent Johnson's written report as to his converstaion with appellant in Wichita Falls on October 10, 1973, discloses that this report reflects that appellant offered him ten thousand dollars to allow appellant to operate his bookmaking operations through the 1973

football season, including the January 1974 super-bowl game. Johnson stated in the report that the refused the offer, but advised his supervisors that no immediate action be taken as he believed that if given time the appellant might become an informant.

At the time the Brady hearing was conducted, Agent Johnson had not appeared as a witness. Later, when he testified on rebuttal after appellant had testified, no request was made for his report. We find nothing favorable to appellant which could have helped him in supporting his defense. See Davis v. State, 516 S.W.2d 157, p. 162; Smith v. State, 516 S.W.2d 415. Error is not presented.

The ninth ground of error is overruled.

Appellant's tenth ground of error reads:

> "The trial court erred in failing to grant the appellant a mistrial after the prosecution inferred that the appellant had committed extraneous offenses."

The record reflects that on cross-examination of State's witness Murphy, it was shown that appellant had been charged in Wichita County with felony bookmaking, but that the charges had been reduced to misdemeanors. During cross-examination of appellant, the State asked if he "had anything going with them up there" to get his cases reduced. An objection was sustained, the question was not answered, the jury was instructed to disregard the question, and a motion for mistrial was overruled. Prior to this testimony, the evidence, to which no objection was made, reflected that the district attorney of Wichita County had advised Captain Murphy "that he would not prosecute the gambling cases in Wichita Falls."

The objection to the complained of question having een sustained and the jury instructed to disregard, we find no prejudice to appellant sufficient to warrant a reversal. Watson v. State, 532 S.W.2d 619; Sternlight v. State, 540 S.W.2d 704; McCarter v. State, 527 S.W.2d 296.

The tenth ground of error is overruled.

Also, there is no merit in appellant's contention that reversible error was committed when the State was permitted to ask appellant if Jim Feagan, the former district attorney, was still a member of the Wichita Falls Bar. Appellant's objection that the question was irrelevant and immaterial "if Mr. Feagan has had troubles of his own" was overruled; however, the question was not answered. The next question was, "Mr. Feagan isn't practicing law up there anymore, is he?" There was no objection made to this question, and appellant answered: "No sir, he's not."

Appellant argues that the fact that Feagan may have been disbarred "has no relevancy whatsoever to appellant's case." The State did not offer testimony of Feagan's disbarment; it merely asked whether he was still a member of the Wichita Falls Bar, which question, to only one to which objection was made, was not answered. Appellant's counsel, on redirect, first brought out before the jury Feagan's disbarment, by inquiring of appellant on redirect whether he knew the reasons for his disbarment. The contention of reversible error is overruled.

In his twelfth ground, appellant complains of the sustaining of State's objection to Defendant's Exhibits Nos. 16 and 17. These were copies of a Dallas newspaper quoting from "well placed government sources" that the Department of Public safety

protected three bookmakers who gave information to the D.P.S. The newspaper articles were clearly hearsay and inadmissible, and the court properly sustained objections to them. Ervin v. State, 531 S.W.2d 337; Gamble v. State, 509 S.W.2d 355; Duncan v. State, 146 S.W.2d 748.

Appellant next contends reversible error in the court permitting the State to impeach defense witness J. M. Carson by showing, on cross-examination, that the witness had been convicted on three occasions in Wichita County of exhibiting an obscene moving picture. Appellant's objection, and also his argument on appeal, is that the misdemeanor offense of exhibiting an obscene movie did not involve moral turpitude.

A prior final conviction generally is not admissible for impeachment unless it is for a felony or for a misdemeanor involving moral turpitude. Trippell v. State, 535 S.W.2d 178.

We quote as follows from 62 Tex.Jur.2d, Witnesses, Sec. 271, p. 243:

> "Offenses that involve moral turpitude so as to make a conviction of them available as impeaching matter have been held to include any felony, keeping a disorderly house, being a common prostitute, or being the inmate of a house if ill-fame, assault by witness on his wife, misdemeanor theft, misappropriation of public funds, adultery, seduction, abducting a child, and swindling."

See also the cases cited in the footnotes on pages 243 and 244 and additionally Johnson v. State, 453 S.W.2d 828, and cases there cited; Holgin v. State, 480 S.W.2d 405; Taylor v. State, 470 S.W.2d 663. All of the cited cases were based on statutes in the former Penal Code. The penal statutes providing for the misdemeanor

offenses of adultery, Art. 499 V.A.P.C., fornication, Art. 503, and keeping a bawdy or disorderly house, Art. 514, are all included in Title 10 of the former Code entitled offenses against Morals, Decency and Chastity. Art. 527 of that Code, the obscene moving picture statute, is contained in this same Title 10.

Likewise, in the present Penal Code, the misdemeanor offenses of prostitution, V.T.C.A. Penal Code, Sec. 43.02, promotion of prostitution, Sec. 43.03, and the felony offenses of aggravated promotion of prostitution, Sec. 43.04, and compelling prostitution, Sec. 43.05, are provided in the same chapter entitled Public Indecency and the same Section as proscribes the misdemeanor offense of commercial obscenity. See Sec. 43.23.[6] Chapter titles in the new Penal Code are enactments of the Legislature.

We conclude that the misdemeanor offense of unlawfully exhibiting an obscene moving picture, whether it was prosecuted under the former or the present Penal Code, is an offense against morals and decency, and that such offense does involve moral turpitude. Appellant's thirteenth ground of error is overruled.

In his final ground of error, appellant complains of the overruling of his motion for mistrial during the State's opening jury argument at the guilt stage as follows:

> "(State): . . . So, this is your responsibility and it's up to you to resolve this issue. On the one hand you have the word of a professional law man and on the other hand you have the word of a professional criminal. Now, for the past several years this country has been beset with one government

[6] Sec. 43.23 is derived from Art. 527 V.A.P.C.

scandal after another. We have had Sharpstown —

"MR. TESSMER: Your Honor, we would object.

"MR. MULDER: —Watergate—

"MR. TESSMER: Just a moment, please. We would object to reference to matters that are not before the jury, scandals as to Watergate or any other —

"THE COURT: Stay in the record, please, Mr. Mulder.

"MR. TESSMER: Would you instruct the jury to disregard that.

"THE COURT: Members of the jury, disregard the last statements, please. Do not consider them for any purpose.

"MR. TESSMER: We move for a mistrial at this time.

"THE COURT: Overruled.

"MR. TESSMER: Exception.

As stated in Watson v. State, 532 S.W.2d 619, 624:

> "It is well established that a jury instruction to disregard a statement will ordinarily cure the error if any. Brown v. State, 516 S.W.2d 145 (Tex.Cr.App. 1974); Zanders v. State, 515 S.W.2d 907 (Tex.Cr.App. 1974); Warren v. State, 514 S.W.2d 458 (Tex.Cr.App. 1974)."

See also Elam v. State, 518 S.W.2d 367; Smith v. State, 513 S.W.2d 823.

Considering the facts and circumstances of this case, and the prompt action of the court in instructing the jury to disregard the complained of statements, we find that the argument of the prosecuting attorney was not so prejudiced or harmful as to cause a

reversal of the judgment. Moore v. State, 542 S.W.2d 664, 676; Gholson v. State, 542 S.W.2d 395, 399.

The judgment is affirmed.

Per Curiam.

(Delivered September 21, 1977)

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas, October 26, 1977

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave To File" the Appellant's Motion for Rehearing in Cause No. 52,545, Archie Dale Carson v. The State of Texas, Appellee.

Sincerely yours,

Thomas Lowe, Clerk